MAR 28 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 1201

LUCIO J. PEPE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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No.

LUCIO J. PEPE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Petitioner, Lucio J. Pepe, prays that a writ of certiorari issue to review the orders and judgments of the Court of Appeals of the State of New York which affirmed the convictions of petitioner for the crimes of unlawful acts in respect to examinations (New York Education Law § 225 (4), (5), (6) and conspiracy to commit the aforesaid violations (New York Penal Law § 580). Pepe was sentenced to three months' imprisonment, but this was stayed on February 6, 1967 by Mr. Justice John Harlan, and petitioner was continued in bail.

Opinion Below

No opinion was given by the Court of Appeals of the State of New York but the judgment of conviction was affirmed by a decision rendered December 29, 1966.* On

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* The Court of Appeals heard argument earlier, but ordered the determination withheld pending a *"Huntley"* hearing (15 N.Y. 2d 764).

March 2, 1967, the Court of Appeals amended the remittitur to reflect the fact that in deciding petitioner's appeal to that court it had necessarily passed upon questions under the constitution of the United States namely whether petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments had been violated in connection with the obtaining from him by the authorities of certain incriminating statements.

The Appellate Division wrote a *per curiam* opinion (one Justice dissenting) which appears in 22 App. Div. 2d 417, 251 N.Y.S. 2d 209 (1964) which is reprinted in the appendix to this petition, Appendix B.

Jurisdiction

The New York Court of Appeals affirmed the judgment of the Appellate Division, First Department which in turn had affirmed the judgment (one Justice dissenting) of the Supreme Court, New York County rendered January 4, 1963. On March 2, 1967, the New York Court of Appeals amended its own remittitur by certifying the existence of questions which it had considered involving the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

On February 6, 1967, Mr. Justice John Harlan of this Court granted a stay of the execution of the judgment herein (three months' imprisonment) and ordered that petitioner be continued on bail pending a determination of his petition for certiorari.

The jurisdiction of this Court is invoked under Title 28, United States Code § 1257(3), and Rules 19, sub. 1, and 22 of the Rules of this Court.

The Questions Presented for Review

1. Whether Petitioner's constitutional rights under the Fifth, Sixth and Fourteenth Amendments were violated when he was, in effect, compelled to give an incriminating statement in an investigation conducted by the New York State Department of Education (which controlled his right to practice medicine) and a representative of the New York State Police under a threat of having his license to practice medicine suspended or revoked if he did not cooperate? (*Spevack* v. *Klein*, — U.S. —, 17 L. Ed. 2d 574 (1967); *Garrity* v. *New Jersey*, — U.S. —, 17 L. Ed. 562 (1967).

2. Whether Petitioner's constitutional rights under the Fifth, Sixth and Fourteenth Amendments were violated, when he was lulled into a false sense of security by "false friends" during an accusatory interrogation before representatives of the New York State Department of Education and the New York State Police who promised him he would have "nothing to fear" if he told them the truth, and in reliance thereon Petitioner gave an incriminating statement (*Spano* v. *New York*, 360 U.S. 315).

3. Whether a defendant in the State of New York who challenges the voluntariness of an incriminating statement, is denied equal protection of the laws under the Fourteenth Amendment, when he is precluded from having a jury trial as to a portion of the evidence to determine voluntariness of such statement, although other defendants are accorded such jury trials on that issue. (See, *Jackson* v. *Denno*, 378 U.S. 368) (1934); (*People* v. *Huntley*, 15 N.Y. 2d 72 (1965).)

The Constitutional Provisions and Statutes Involved

The constitutional provisions are the "due process" and "equal protection" clauses of the Fourteenth Amendment as well as the Fifth and Sixth Amendments of the Constitution of the United States. The Statutes involved are Sections 225(4) (5) (6) of the New York Education Law;

Section 580 of the Penal Law; and Section 395 of the Code of Criminal Procedure of the State of New York. These constitutional provisions are set forth in the appendix to this petition, as are the pertinent statutes (Appendix A).

Statement of the Case

Petitioner Pepe is a licensed physician in the State of New York as well as in Italy. The co-defendant, Pietro D'Alba was a candidate for the medical licensing examination in New York in 1961.

The charges brought against Dr. Luigi Baviello, Petitioner, and his co-defendant, Pietro D'Alba, stemmed from a scheme wherein it was alleged that Pepe, Baviello, and D'Alba conspired with a Dr. Styles Ezell, Secretary of the Board of Medical Examiners of the State of New York, to obtain the questions for the forthcoming June 1961 Medical Board Examinations, and to then sell those questions and answers to prospective candidates for that examination.

Apparently Dr. Ezell, under a ruse of editorial inquiries, obtained a copy of the 1961 Examination from the Examination Editor (134-6, 173, 208, 210, 252, 353-4).*

It was alleged that Dr. Ezell transmitted a handwritten copy of this material to Petitioner Pepe (512, 1554-5, 1582-5, 1592-6, 1600-3, 1606-7), and Dr. Pepe gave the material to Dr. Luigi Baviello, who was a practicing New York physician (1559-60, 1575). It is alleged that Pepe and Baviello agreed to sell these questions for $20,000 (504-5, 634-9) and to share the receipts with Ezell (437-8, 500, 634, 641-2, 652-3, 1569-70, 1605-8).

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* Numerals in parentheses refer to pages of the Official Court Reporter's Minutes of Trial in the Supreme Court, New York County.. Any numerals preceded by the letter "H" refer to Minutes of the "Huntley Hearing" (*People* v. *Huntley*, 15 N.Y. 2d 72).

Dr. Baviello enlisted co-defendant D'Alba who was taking a review course in preparation for the examination. D'Alba agreed to get the money from other candidates in the course (439-42, 504, 597, 599, 603-5, 1624-9, 1654-8) and he solicited several candidates in order to raise $2,500 from each (1630-3, 1664-8, 1702-5, 1731-2, 1751, 1865-6, 1901, 1910-13, 1929, 1981, 1986-7).

A brief interval prior to the examination itself, D'Alba gave Baviello $10,000 for four (4) copies of the questions and answers to the first part of the examination and was "guaranteed" that the money would be returned if the questions were not correct (509-10, 608). Appellant Pepe received $5,000 from Baviello (510-11, 1568). Pepe supposedly gave $1,000 to Ezell (H. 115-16, 150).

Just prior to the examination, Ezell reported to Pepe that the examination had been withdrawn in Albany and that another had been substituted (1570-1, 1575-7, 1604). Pepe immediately cautioned Baviello that their scheme had been discovered (511) and Baviello notified D'Alba (511, 636-7), who in turn cancelled the arrangements with the other candidates (1700, 1704, 1785, 1872, 2059). The currency was returned, and the contraband material collected (511, 1568-9, 1637, 1872, 2065).

The New York State Department of Education which is the bureau that licenses physicians in the State of New York joined by the State Police commenced an investigation and questioned candidates who had been offered the questions (1706-15, 1807-10, 1915-18, 1954, 1957-8). As a result of the interrogations they learned the identities of alleged participants.

The investigators interrogated Pepe under oath before a hearing reporter in his own room on July 19, 1961 (1539, 1554-87; H. Exhibit 3). The record appears clear that he was intimidated and bullied, and then lulled into a false sense of security by threats and promises including exhortations from a "false friend" namely, Dr. Baviello,

who by this time was working with the authorities to obtain Pepe's confession. Pepe was brought to the Department of Education the following week (July 25th) and made another incriminating statement (1588-96, 1600-8; H. Exhibit 4). On both of these occasions he received no warnings of his rights.

Two weeks later, however, on August 9, 1961, Pepe was interrogated for a third time and gave a similar statement to the prosecuting attorney, this time being apprised of some of his rights (H. Exhibit 7). In the indictment which was returned on August 29, 1961, Pepe, D'Alba and Baviello were jointly charged with conspiracy and violation of Section 225 of the New York Education Law. Baviello however pleaded guilty to several charges and the trial later commenced only as against Pepe and D'Alba.

The Statements which are the Subject of the Instant Application for Certiorari

At the trial and during a so-called "Huntley Hearing" conducted subsequent to the trial by order of the New York Court of Appeals (15 N.Y. 2d 764), it appeared that Dr. Pepe, the Petitioner herein, was questioned under oath on July 19, 1961 in the presence of a hearing reporter by several people, including an investigator for the Department of Education, Howard Picard, August Bardo, Jr., Director of Professional Conduct of the Department of Education (who was also an attorney at law and had been an investigator for state agencies for over 14 years), and John Cronin of the New York State Police.

In addition, Dr. Luigi Baviello, Pepe's "friend" and conspirator, and Alfred Pockrass, another investigator for the Dept. of Education, were likewise present at this interrogation. It lasted, according to the stenographic report thereof between 6:15 and 8:05 P.M.

During the course of this questioning, Petitioner Pepe was quizzed in a staccato manner by several of the persons present and received a number of threats as well as assurances that if he cooperated, he had nothing to fear (1530-87, 1609-18). For example, the following are excerpts of the interviews with Dr. Pepe conducted by the licensing authority (N. Y. Education Department) and the State Police:

"*Examination by Mr. Bardo*:

"Question: Doctor, you obtained a medical license in this State when?

"Answer: Yes, in March.

"Question: In approximately March of 1961?

"Answer: Yes.

"Question: Doctor, we would like to have you tell us about something, and we would like to have you make these statements under oath.

"Answer: Yes.

"Question: He is a Notary Public. (A reporter) Would you raise your right hand, please?

"(At this point the witness was duly sworn by me.)

"Question: Doctor, we have talked with other persons in connection with this recent examination that was just given from June the 27th to June the 30th, 1961, and we have reason to believe that the questions that were proposed to be asked on this June examination were made known to persons in advance of the examination. Do you know anything about that?

"Answer: What?

"Question: That persons were made aware of the questions that were going to be asked on the June medical examination before it was given. Do you know anything about that?

"Answer: No; first time I hear this, because I don't believe the question before; it was impossible. That is what I think. I don't know. I don't know." (1540-1)

"Question: Doctor, I think we had better start over again. I think we'd better start over again.

"Answer: We have all subjects.

"Question: I know. Wait a minute, let's start over. Let's not get too deep into that. Dr. Luigi Baviello—he is here present—we have talked to him earlier today, and other people. Dr. Baviello, tell Dr. Pepe, in substance, what you told us.

"Mr. Picard: Let's get it straightened out.

"Mr. Bardo: We don't want you to go ahead and commit perjury, Dr. Pepe. Listen to what he has to say.

"Dr. Baviello: I said that I got the questions from you and you got the questions from Ezell. I said this. (1547)

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"*By Mr. Picard*:

"Question: *You don't want to place your license in jeopardy, you don't want to prejudice your medical license, do you?*

"Answer: *No, no.*

"*By Mr. Bardo*:

"Question: *Do you want to lose it?*

"Answer: *No, no, I don't want to lose it.*

"*By Mr. Picard*:

"Question: All right, *then cooperate with us and tell us the truth about this thing,* because all we want is your cooperation so we'll know what course of action to follow. Now, if you don't help us, necessarily, we're going to involve you, but deep. (1609-10)

"Question: We know a lot of things, Doctor, *You're committing perjury. You're under oath.* This is perjury you could be sent to jail for. Don't do it, please. Tell us what you know.

"Answer: This I know, this I know." (1610)

"*Mr. Picard*: (Continuing)

"Question: Your own intelligence should tell you, Doctor, that we're primarily interested in cleaning our own department. This is a wrong situation. Now, this—we can't tolerate this sort of thing, so we want to clean, to clean our own house, and we have come to you, with that thought

in mind, that you would cooperate with it. Now, lacking your cooperation, we're going to have to follow some other course of action. That's only natural. So this Doctor here, Baviello, has told us what we believe is the truth, and we have gotten the truth from a number of other doctors who were involved in this thing and who turned money over to him. Now, as I say, we also have the benefit of information we picked up during the course of our investigation: following people, *checking telephone records*, so we can tell you a long list—a lot of things, Doctor. I plead with you, don't perjure yourself.

"Answer: I don't want to perjure myself.

By Mr. Pockrass:

"Question: If you don't tell us the truth, you may find yourself before a Grand Jury, and perhaps facing a criminal indictment, instead of *merely* departmental action here.

"*By Mr. Picard*:

"Question: Do you want to go to State Prison? Then tell us the truth.

"*By Mr. Bardo*:

"Question: Tell us the truth, Doctor; we know.

"*By Mr. Picard*:

"Question: *We know the truth. Tell us the truth.*

"*By Mr. Bardo*:

"Question: What are you going to be a sucker for and take it all yourself? Right now it looks as though you got the questions. How did you get them? You got them from somebody. You'd better get rid of this thing. Don't keep it all—

"Mr. Picard: (Resuming questioning of Dr. Pepe):

"Question: Now, Doctor, do you want us to go to the Grand Jury with this and—.

"Dr. Baviello: Listen, I know—

"Question: You're putting him in jail and yourself in jail.

"Dr. Baviello: *We made the mistake. I know it's a bad thing that happened, but at this point I think it's better to clarify everything and maybe, you know, if we say the truth, maybe they will help us.*

"Question: That you can believe, Dr. Pepe, we will. We can't help, though, if you don't want to help yourself.

"Mr. Bardo: You're a sucker to go it alone.

"Question: You see, we're forced to go through with this. We can't stop now; but you can narrow the path that we follow. We are mainly concerned with our own family, the people in Albany. We want to correct this situation so it doesn't occur again, and I think you would agree that's proper. That's why we are here talking with you now." (1613-15)

"*By Mr. Picard*:

"Question: Tell us then, Doctor, tell us what you can. We'll forget about the rest of it. You're going can make sure that all examinations in the future are honest, without the necessity of the intervention of a Grand Jury. Now, do you want to tell us the truth of your participation, and whom you contacted, whom you got those questions, those notes from?

"Answer: I told you.

"Question: Well, when you're telling us that, we think you're lying, and you've been flatly contradicted by *Dr. Baviello, your friend here.*" *

"*By Mr. Picard*:

"Question: *Doctor, would you and your friend come out in the hall and talk to me just a minute,* and then we'll come right back in again. [This is page 23.]

"Answer: Anything you say, anything you say.

"(At this point, 7:35 p. m., Doctors Baviello and Pepe accompanied Mr. Picard out of the hearing room into the hallway. After a recess of about ten minutes, the above-mentioned three gentlemen returned and the hearing was continued.)" (1616-17)

Pepe gave an incriminating statement thereafter.

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* Dr. Baviello himself testified that he and Pepe were *close friends* and in fact had worked and lived together for three (3) years (662-665; 658; 642-3; 604; 436; 431). They also visited with one another.

At another point in the questioning Pepe was cautioned by Police Officer Cronin that if he did not cooperate he would wind up losing his medical license here and in Italy because these gentlemen will see to it" (1613-14).

At still a later time, Pepe was told "*you don't have to be afraid of anyone . . . .we'll take care of that*" (1615-16). Later Pepe was advised that "telephone calls had been traced" and "we know a lot of things . . . you committed perjury . . . you could be sent to jail . . ." (1551-2, 1610).

The interview contained a number of other similar instances, all of which clearly indicate that threats, cajoling, trickery and promises that amounted to guarantees of immunity were made to Pepe. As a further example petitioner was told that if he did not cooperate he would face a "criminal indictment" instead of merely departmental action (1612).

From all the foregoing, it is quite obvious that Pepe was clearly given the impression that if he cooperated no criminal charges would be brought against him and he would save his medical license, but that if he did not cooperate, he would not only suffer a loss of his ability to practice medicine here and in Italy but would also face criminal prosecution.

At no time was Pepe advised of his constitutional rights by any of his interrogators.

Another "interview" took place on July 25, 1961 at the Department of Education itself and as a result of that inquisition Pepe further incriminated himself in the scheme to sell examination questions and answers. On August 10, 1961, when questioned by the prosecutor, Pepe for the first time was advised of his constitutional rights and was again precipitated into giving an incriminating statement. On this occasion, only, was any pretense at all made warning Petitioner of his rights.

As an indication of how loathe Dr. Pepe was to inculpate himself and how disinclined he was to incriminate

himself, it need only be observed that once he obtained counsel, Petitioner refused to waive immunity before the Grand Jury and declined to answer any questions at all. It is therefore obvious that had he had the benefit of an attorney present he would have unquestionably refused to answer and consequently he would probably not have been convicted since concededly his statements were required to obtain a conviction.

It is obvious from the record however, that Dr. Baviello, by the time of the interviews with Pepe had already decided to cooperate with the authorities and appeared as a *"false friend"* imploring the Petitioner to cooperate. Baviello for example stated to Pepe "I think at this point, it is better to clarify everything, so we clarify, they will clarify, and maybe they will help us" (H. Exhibit 3, pp. 9-10). At another point Baviello stated to Pepe in the presence of the interrogators "I said that I got the questions from you and you got the questions from Ezell" (1547).*

It is clear from a perusal of this interview that the presence of Baviello was used to very good advantage to compel Pepe to "crack". For example, at one point Baviello interjected that Pepe had asked for $20,000. Pepe replied that that was not correct. That Pepe was compelled to correct this impression since he was now being put in a position of not only being oppressed by his interrogators, but being faced with apparently deliberate and provocative lies by a cooperating accomplice to evoke particular answers (1565-1567).

On none of these interviews was Pepe ever represented by counsel, and despite the fact that he was a native of Italy, and labored with a language problem, no effort was made to even enlist the help of an attorney or interpretor. Pepe, of course, understood English, but by the same token he was in a foreign country so far as his place of birth was concerned and he was fearful of losing his license to practice both in his home-land, as well as here.

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* See footnote on page 10, supra.

The very authority, namely the New York State Department of Education, which has the right to license physicians or discipline them including revocation of such license, conducted the interrogation of Petitioner in conjunction with a representative of the New York State Police. With obvious premeditated design, the insidious stratagem of having a cooperating co-conspirator present, Dr. Baviello, who also implored Petitioner to incriminate himself, unquestionably took its toll on Pepe's ability to resist his inquisitors.*

At the outset of the initial interrogation, it is clear that Pepe declined to say anything and denied his guilt completely. It was only after repeated threats, cajoling, promises and exhortations from various people, including his "friend", Dr. Baviello, that Pepe finally "cracked" and gave the highly incriminating statements which unquestionably resulted in his conviction.

The Indictment

The indictment herein charged Petitioner Pepe, Pietro D'Alba, and Luigi Baviello with violations of the New York Education Law, Section 225 (4), (5), (6), which involved "unlawful acts in respect to examinations" and also charged a violation of the conspiracy statute in New York State, *i.e.*, Penal Law Section 580.

Basically the indictment alleged that the defendants conspired with each other to secure questions and answers to the June 1961 New York State Medical Board Examination for the purpose of selling these questions and answers to candidates seeking to pass that examination and thereby obtain a license to practice medicine in this State.

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* The formality of having a hearing reporter administer an oath, coupled with the presence of officials of the Dept. of Education and the State Police, made this a "Kangaroo Court" and must have conveyed to Pepe the impression of a *formal* hearing not just an interview.

Reasons for Granting Certiorari

POINT I

Doctor Pepe, the petitioner, an Italian immigrant, licensed to practice medicine in New York and Italy, summarily sworn before a hearing reporter in his own apartment after normal business hours, was interrogated in an accusatory inquiry by a member of the State Police, three officials of the Department of Education, including the Director of Professional Conduct (which department had the power to suspend or revoke his medical license), and with the insidious help of a cooperating co-conspirator, posing as Pepe's "friend" (Dr. Baviello). Pepe was threatened, cajoled, tricked, and given "phony" promises in a staccato fashion, as a result of which he finally succumbed to this psychological pressure and uttered incriminating statements and a confession, which proved to be the sole evidence upon which his conviction was predicated.

—A—

The interrogation before a hearing reporter and under oath by officials of the very department having jurisdiction over his medical license was by far more outrageous and extreme than the tactics condemned in *Spevack* v. *Klein*, — U.S. — (1967). Unlike *Spevack*, however, Petitioner did not have a legal background and not only was uninformed of his constitutional rights, but labored with a language handicap, as his native tongue was Italian.

—B—

In effect, Pepe was compelled to testify against himself in a "disbarment" proceeding.

The facts herein reveal that Petitioner was a medical doctor licensed to practice here (New York) and in Italy. He unquestionably understood English, but his imperfect grammar and foreign birth reveal that he did labor with a language barrier—his native tongue being Italian.

Dr. Luigi Baviello, described by Pepe's interrogators as "your friend" was undoubtedly cooperating with the authorities who came to Pepe's apartment on July 19, 1961 with a hearing reporter to take a sworn statement from him concerning the theft and sale of the June 1961 medical board examination questions, a crime to which Dr. Baviello, who was also present, told Pepe he had already confessed and that he had implicated Petitioner, too (1547, 1617, H. Exh. 3, 9-10).

Those present, beside Baviello, at the interrogation were August Bardo, Jr.,* Director of Professional Conduct of the Department of Education, and two investigators with that agency, Pockrass and Picard, as well as Cronin of the State Police. The Department of Education, as Pepe unquestionably knew because he was so informed, had the power to suspend or revoke his medical license. Dr. Baviello was a "trojan horse" posing as a "friend", who undoubtedly contributed to the massive pressure exerted against Pepe by way of threat and promises and false hope of leniency which ultimately caused him to incriminate himself.

There is no denial that Pepe was never advised of his rights by any representative of the Department of Education and certainly by no one at all until August 10th when the prosecutor finally saw him and obtained a third incriminating statement. The assistant district attorney partially advised him of his rights on this third interrogation.

It is also conceded that at the crucial July 19th investigation, the inquisitors knew beforehand that Pepe was a prime suspect. *The inquiry was admittedly accusatory and not investigatory.*

This Court's recent ruling in *Spevack v. Klein,* — U.S. —, 17 L. Ed. 2d 574 (1967) clearly indicated that a con-

* Bardo was also a lawyer and an experienced investigator.

fession or incriminating statement is coerced if the declarant or suspect faces such pressures as "dishonor of disbarment" or the "deprivation of a livelihood" as the price for refusing to talk.

While *Spevack* dealt with an attorney who unquestionably was at least aware of his constitutional rights, the case at bar is far more extreme since Petitioner, Pepe, was not only a foreign born immigrant in this country, but moreover, undoubtedly was unaware of his constitutional rights in any meaningful sense.

The persons who questioned Petitioner during the crucial initial interview of July 19, 1961 at his apartment were not just some local police officials conducting an investigation, but on the contrary were officials of the Department of Education of the State of New York, which had plenary power to suspend or revoke Pepe's medical license or to otherwise discipline him.

It cannot be gainsaid that the threatened loss of a medical practice poses as great a calamity as the loss of the right to practice law and exerts as much pressure. Pepe faced interrogation in an *accusatory* "hearing" since his interrogators acknowledged that they were already fully aware of his participation in the crime because his co-conspirator, Dr. Luigi Baviello, who was also present, had already fully advised them of the circumstances. Baviello, who was described as Pepe's "*friend*" confirmed this fact and implored Pepe to cooperate fully indicating that this course of action alone could help him. Baviello testified that he and Petitioner were *close friends,* and had lived together for three years (662-665).

A hearing reporter, who was also a notary public, for the Department of Education was present to stenographical record the inquiry and administered an oath to Pepe before the interview commenced in Pepe's home on July 19, somewhat after 6 P.M. One of the persons present was August Bardo, Jr., who was *Director of Professional Conduct of the Department of Education.*

In addition, there were two other investigators with the Department of Education present, namely Pockrass and Picard. These three persons alone, to say nothing of Cronin who was a member of the New York State Police, would certainly lend the aura of officiality to the proceeding and unquestionably conveyed the impression that this was a *formal hearing* wherein Pepe's cooperation was mandatory, otherwise the full gamut of penalties within the jurisdiction of the Department of Education could be imposed upon Petitioner.

It is certainly quite unusual to administer an oath except at a formal type of hearing yet, according to the prosecution, this was merely an "informal" interview. The administration of the oath, *ipso facto*, was additional pressure applied against Pepe since he probably and understandably, felt, and was also told, that he could be punished for *perjury* if his answers were not completely truthful, in addition to everything else.

To attempt to draw a line of distinction between what occurred on July 19th, in Pepe's residence, and a proceeding before a Judicial Inquiry of the Bar Association would be to close one's eyes to the substance, in an attempt to equivocate on procedure. There can be no doubt that, in essence, Pepe was on the same anvil that a witness finds himself when he testifies before a Grand Jury under a waiver of immunity, or a judicial inquiry brought by a Bar Association.

Had the District Attorney subpoenaed Pepe to testify before a Grand Jury under oath without advising him of his rights, nor having him sign a waiver of immunity, there is no doubt but that Pepe could not have been indicted for any crime by that Grand Jury (*People* v. *Laino*, 10 N.Y. 2d 161 (1961); *People* v. *Steuding*, 6 N.Y. 2d 214 (1959).*

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* The promises of Bardo who was Director of Professional Conduct of the Dept. of Education, as well as an attorney, might be deemed a promise of immunity under § 395, Code Crim. Pro. (App. A).

The officials of the Department of Education, however, as has already been demonstrated in this petition, assured Pepe that his cooperation would obviate the necessity of his appearing before a Grand Jury and would preclude the possibility of criminal action being taken against him.

Pockrass for example clearly advised Pepe that unless he told the truth ". . . you may find yourself before a Grand Jury, and perhaps face a criminal indictment *instead of merely Departmental action here*". Picard then interjected "do you want to go to State Prison? Then tell the truth" (1611-1616).

The inescapable impression given to Pepe was that this interview itself was part and parcel of "departmental action". Pepe was not advised of any of his rights, but on the contrary was threatened with possible revocation of his license, here and in Italy unless he cooperated. Pepe was further lulled into a false sense of security by the supplications of Dr. Baviello his *"friend"* and co-conspirator who told him that he himself had already fully cooperated and confessed, had implicated petitioner, and advised Pepe that only by full cooperation could he hope to help himself (1611-1615).

In retrospect, of course, it is manifest that Pepe was deluded, tricked, and victimized because the very statements and confession which he gave turned out to be the sole evidence upon which his conviction would stand or fall (2974-5).

Returning for the moment to *Spevack* v. *Klein, supra,* it does not appear that any material difference really exists between what occurred with Pepe and what was experienced by *Spevack.* Both were professional people who were licensed to practice in the State of New York. *Spevack* had the distinct advantage of being a lawyer and therefore was presumably cognizant of his constitutional rights, whereas Pepe was not only an Italian immigrant with a language problem, but additionally had no inkling, in all likelihood, of his rights.

This is particularly evident from the fact that when Pepe, on August 10, 1961, following his third incriminating statement to the authorities, was finally advised of his rights, he thereafter refused any further interviews and retained a lawyer who admonished him to stand mute and not to waive immunity before the Grand Jury.* Had legal advice been given to him immediately, or had his rights been explained to him it is logical and probable that under no circumstances would the confession and statements have been wrested from him.

As is recognized, the sole distinction between *Spevack* and the instant case is that the former matter, a judicial inquiry was involved whereas here the interrogation was conducted by responsible officials of the licensing agency itself, namely the State Department of Education—quite analogous to a judicial inquiry.

So far as Pepe was concerned, the interrogation by the Department of Education was undoubtedly more formidable, awesome, and potentially dangerous to his medical license and economic survival than any interrogations before a Grand Jury.

This Court has held quite recently that the Fifth Amendment's self incrimination clause was certainly applicable to the states by reason of the Fourteenth Amendment (*Malloy* v. *Hogan,* 378 U.S. 1). In *Spevack* v. *Klein, supra,* this Court explained that it necessarily had to overrule *Cohen* v. *Hurley,* 366 U.S. 117, in view of what had transpired in *Malloy* v. *Hogan, supra.* In *Spevack,* this Court explained that despite the fact that a person holds a professional license such as a lawyer (or doctor), he is nevertheless entitled to the full protection of the Fifth and Fourteenth Amendments. Thus, this Court elaborated (*id.* 17 L. Ed. 2d at 277):

> "*And* so the question emerges whether the principle of Malloy v. Hogan is inapplicable because

petitioner is a member of the Bar. We conclude that Cohen v. Hurley should be overruled, that the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the *deprivation of a livelihood as a price for asserting it.* These views, expounded in the dissents in Cohen v. Hurley, need not be elaborated again.

"We said in Malloy v. Hogan:

'The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement —the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, *and to suffer no penalty . . . for such silence.*' 378 US, at 8, 12 L ed 2d at 659." (Italics ours)

While the Fifth Amendment is sometimes thought to refer to "criminal penalties", this Court's decision in *Spevack* v. *Klein, supra,* made it quite obvious that the context of "penalty" refers not only to a fine or imprisonment, but also to the imposition of any sanction which makes the assertion of the Fifth Amendment privilege *"costly"*.

"In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in Griffin v. California, 380 U.S. 609, 14 L ed 2d 106, 85 S Ct 1229, the imposition of *any sanction which makes assertion of the Fifth Amendment privilege 'costly'. Id.* at 614, 14 L ed 2d at 109. . . .

"The threat of disbarment and the *loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion* to make a lawyer relinquish the privilege. That threat is indeed as powerful an instrument of compulsion as 'the use of legal process to force from the lips of the accused individual the evidence necessary to convict him . . .' United States v. White, 322 U. S. 694, 698, 88 L ed 1542, 1546, 64 S Ct 1248, 152 ALR 1202. As we recently stated in Miranda v. Arizona,

> 384 U.S. 436, 461, 16 L ed 2d 694, 716, 86 S·Ct 1602, 10 ALR 3d 974, 'In this Court, the privilege has consistently been accorded a liberal construction.' It is in that tradition that we overrule Cohen v. Hurley. We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others." (Italics ours)

The damage of course, had been done already and the trial almost became an "*inquest*" since the admissions of Pepe and his confession virtually precluded any result other than that of "guilty".

The officials of the State Department of Education and the State Police who succeeded in extracting the confession and incriminatory statements from Pepe did not only use these to bring revocation proceedings against his medical license, but turned them over to the prosecuting authorities who were then able to obtain an indictment and ultimate conviction of the Petitioner. The charge of the trial Court acknowledged that these statements were so vital that they were the *sine qua non* of his conviction. It cannot be denied that sans these statements, the prosecution would have had an insufficient case to even go to the Grand Jury, no less a Petit Jury (2974-5).

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this court stated that the very fact that threats, trickery, and cajoling are utilized is of itself convincing evidence that statements thereby obtained are not voluntary and were not obtained by a waiver of constitutional rights. Thus this Court declared (*id.* 384 U.S. at 486):

> "Moreover any evidence that the accused was threatened, *tricked* or cajoled into a waiver will, of course, show that the defendant did *not* voluntarily waive his privilege."

Accord: *Townsend* v. *Sain*, 372 U.S. 293 (1963); *Spano* v. *New York*, 360 U.S. 315 (1959); *Leyra* v. *Denno*, 347 U.S. 556 (1954); and *Jackson* v. *Denno*, *supra*.

The threat of imprisonment, while a powerful form of compulsion, could not nearly have frightened Pepe as much as the possibility of losing his right to practice medicine here and in Italy, with the consequent complete nullification and ruination of all the years of preparation, time, expense, and "blood, sweat and tears" which preceded his becoming a medical doctor.

With such a catastrophe looming over him, coupled with the promises of the officials of the Department of Education, to say nothing of the assurances of his "false *friend*", Dr. Baviello, that cooperation would be his salvation, is it any wonder that Pepe ultimately gave in and fully cooperated with his interrogators giving them the highly incriminating statements which alone resulted in his conviction? (2974-5)

It is therefore submitted that *Spevack* v. *Klein, supra,* is not nearly as shocking as the instant case, and the doctrines there laid down should be applied to the case at bar, otherwise an irreparable injustice will result.

POINT II

The reprehensible methods used in the instant matter to extract incriminating statements from Petitioner (a physician) bear striking similarities to those which were condemned by this Court in *Spano* v. *New York*, 360 U. S. 315. If anything, the tactics used against Pepe were more extreme: Not only was a "false friend" (Dr. Baviello) brought in at the interrogation to lull Petitioner into a false sense of security and to make him "crack", but representatives of the very department which had the authority to revoke or suspend his medical license conducted the inquiry and also made numerous promises and threats. At no time, unlike Spano (who had been surrendered by an attorney), was Pepe ever advised of his legal rights. Like Spano, Pepe was an Italian Immigrant with a less than perfect command of the English language.

The Petitioner herein was licensed to practice medicine in Italy and in New York as well. He had obtained his license in this state about four months before the incidents which gave rise to the instant indictment.

Highly skilled investigators as well as representatives of the State Police and the New York State Department of Education had obtained admissions from Dr. Luigi Baviello, a co-conspirator of Pepe's, that Pepe was involved in a scheme with Baviello and others to secure questions and answers to the June 1961 Medical Board Examinations and to sell those questions and answers to candidates who were taking that examination.

Knowing therefore that Pepe was a *prime suspect*, these highly experienced investigators, one of whom at least was an attorney at law (August Bardo, Jr.) procured the cooperation of Dr. Luigi Baviello who was described as a *"friend"* of Pepe's, and descended on Pepe's residence

at about 6:15 P.M. in the evening of July 19, 1961 without advising him of any of his rights whatsoever.

During this interview, Pepe at first completely denied any involvement whatsoever in the crime. Baviello was then brought into the picture as a "Trojan Horse" and it was he who implored Pepe to cooperate (1615). Baviello admitted he and Pepe were close friends (662-665).

As has already been set forth, an assortment of threats and promises were made by the authorities to Pepe. On the one hand he was told that if he cooperated in helping the Department of Education "clean its own house", there would be no need to have this brought before a Grand Jury. Thus, he was in effect assured that his cooperation would stand him in good stead; that he would have nothing to fear criminally; and that he would save his license to practice medicine thereby.

On the other hand, he was sternly threatened with loss of his medical licenses in the United States and Italy and by criminal prosecution and possible incarceration if he refused to cooperate. He was told that "telephone calls had been traced" and that "we know a lot of things . . . you committed perjury * . . . you could be sent to jail" (1610-15).

Then Mr. Picard, an investigator for the Department of Education which had jurisdiction over Pepe's medical license, invited the Petitioner and his "*friend*" Dr. Baviello to step outside of Pepe's room and the shorthand reporter made a notation that this trio were absent from the hearing for ten minutes (1617). Upon return to the room Pepe suddenly started to cooperate with the authorities.

In the *Spano* case, the defendant there had been advised by an attorney at law prior to his surrender to the District Attorney. He at least knew his rights. Notwith-

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* The July 19th interrogation was conducted after a hearing reporter who recorded the conversations, had administered an oath to Pepe. He therefore was fearful of *perjury* in addition to other threats hurled at him.

standing that substantial benefit, this Court unanimously reversed his conviction on a number of grounds, not the least of which was the employment of a "false friend" to convince him to cooperate and incriminate himself.

At another juncture Dr. Baviello was brought into the picture and he stated (H. Exh. 3, 9-10; 1547):

> "We made the mistake. I know its a bad thing that happened, but at this point I think I think it is better to clarify everything, and maybe, you know, if you say the truth, maybe they will help us."

Immediately after this, Picard interjected "that you can believe, Dr. Pepe, we will". Then Bardo interjected, "We are mainly concerned with our own family, the people in Albany. We want to correct this situation so it doesn't occur again. . . ." Picard then took up the cudgels and interjected, "Tell us then, Doctor, tell us what you can. *We'll forget about the rest of it.* You're going to make sure that all the examinations in the future are honest, *without the necessity of the intervention of the Grand Jury*" (1612-18).

Dr. Baviello was referred to as Pepe's "your *friend*" here". Picard then invited Pepe and "your friend to come out in the hall and talk a few minutes" (1617). This Pepe did and shortly thereafter began to give incriminating statements.

Pepe was told that if he did not cooperate he would lose his license here and in Italy "because these gentlemen will see to it". Later Pepe was assured "you don't have to be afraid of anyone . . . we'll take care of that". At another point Pepe was told "telephone calls had been traced" and "we know a lot of things . . . you committed perjury . . . you could be sent to jail . . .". The interrogators indicated that cooperation would mean merely departmental action

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It is important to note that Dr. Baviello testified that Pepe and he were *close friends* and had lived and worked together for three (3) years (662-665; 658; 642-3; 604; 436; 431).

whereas failure to cooperate would possibly involve him in a "criminal indictment" (1547, 1612-1618; H. Exh. 3, 9-10).

Coupled with the foregoing is the fact that promises of all sorts were made to Pepe that no harm would come to him if he cooperated and then his "friend" Dr. Baviello was brought into the picture to further lull him into a state of mind whereby he would be disposed to cooperate. As stated in *Spano* v. *New York,* 360 U.S. 315, 323:

> "Petitioner was apparently unaware of John Gay's famous couplet:
>
> 'An open foe may prove a curse
> But a pretended friend is worse,'
>
> and be yielded to his false friend's entreaties."

Mr. Justice Roberts observed in *Sorrells* v. *United States,* 287 U.S. 435 at 453 (1932), in which Mr. Justice Brandeis and Mr. Justice Stone concurred that:

> "The efforts . . . to obtain arrests and convictions have too often been marked by reprehensible methods. . . ." Justice Roberts continued by referring to these methods as a "prostitution of the criminal law," (*id.* 287 U.S. at 457).

In the case at bar, Pepe of course did not have the benefit of legal advice prior to this interview and was unquestionably "disarmed" by the fact that not only was his friend Dr. Baviello asking him to cooperate, but representatives of the Department of Education of the State of New York which controlled his license to practice medicine likewise indicated that they would be friendly and helpful if he only cooperated.

That these promises were completely false is obvious from the fact that Pepe was later indicted, convicted on the basis of his incriminating statements and has now been sentenced to jail for three months. His licenses to practice medicine are in serious jeopardy both in New York and presumably in Italy. As a matter of fact, revocation proceedings were instituted by the Department of Education of the State of New York and only a stay now stands between him and possible complete disbarment from practice.

It must be borne in mind that Dr. Baviello had unquestionably already made a "deal" with the authorities since he plead guilty shortly after the indictment and was never tried. There is no doubt that his service in procuring Pepe's incriminating confession was a factor which militated strongly in Baviello's favor. In every sense of the word, the interrogation under oath of Pepe was a "Kangeroo Court" which in effect was conducting a "Star Chamber" type of hearing which would irrevocably lead to his indictment, conviction and loss of his medical license.

Following the July 19 meeting with the authorities, there was no problem in obtaining corroborative incriminating statements at another hearing in the Department of Education on July 25,* and finally at an interview with the prosecutor himself on August 10. When Pepe finally did procure legal advice, after August 10th, he refused to cooperate with the authorities, declined to waive immunity, and said nothing further. It is obvious therefore that had he known fully of his legal rights, he would unquestionably have refused to say anything detrimental to himself. No doubt the concept of "immunity" or the "Fifth Amendment" were completely foreign to him particularly in view of the fact that he was an Italian immigrant with very little knowledge of law.

In *Malloy* v. *Hogan*, 378 U.S. 1, 8, this Court declared that the Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against Federal infringement. The same sentiment was reiterated by this Court in the case of *Spevack* v. *Klein* U.S.—17 L. Ed. 2d 574 (1967) and *Garrity* v. *New Jersey* — U.S. — 17 L. Ed. 2d 562 (1967).

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* Howard Rice, an investigator with the Dept. of Education for 14 years and a former State Trooper for 14 years treated the threats as proper. "A little bit of fear helps"—fear helps to "prod" a reluctant witness (1345).

While it may be true that in the case at bar a "Huntley Hearing" (pursuant to *People* v. *Huntley*, 15 N.Y. 2d 72) probed the issue of voluntariness of the confession, it is quite obvious that the issues with respect to employment of a "false friend" and "threat of economic reprisal" were raised but were not fully appreciated by the New York Courts.

To this extent this case parallels *Spano* v. *New York, supra,* since there too, a very careful analysis of the factual situation involving Spano's confession was made, but it remained for this Court to determine that "traditional" concepts of voluntariness had been violated by the employment of the tactics there utilized. It is therefore again incumbent upon this Court to reemphasize its position that it will not tolerate the invasion and deprivation of constitutional rights by the use of psychologically coerced confessions (cf. *Leyra* v. *Denno,* 347 U.S. 556, [1954]).

—A—

***Spano* v. *New York* is a controlling precedent. The case at bar contains more compelling reasons for reversal than *Spano*.**

In *Spano* v. *New York,* 360 U.S. 315 (1959) this court had occasion to condemn tactics of public authorities in obtaining a confession that were far less extreme than those evident in the case at bar. *Spano* had been convicted of a serious crime in the State of New York and the conviction was affirmed 4-3 by the New York Court of Appeals. However, all seven judges were convinced that the confession in the *Spano* case was not involuntary under 'traditional" principles laid down by this Court in such cases as *Stein* v. *New York,* 346 U.S. 156; *Malinski* v. *New York,* 324 U.S. 401; *Stroble* v. *California,* 343 U.S. 181; *Blackburn* v. *Alabama,* 361 U.S. 199, and similar cases.

In reversing the conviction in the *Spano* case, however, this court disagreed with all seven judges of the New York Court of Appeals from the standpoint of involuntariness under "traditional" principles theretofore laid down by this Court.

In the main opinion in *Spano* written by the Chief Justice, this court held that it had the duty to make its own examination of the record (*Norris* v. *Alabama*, 294 U.S. 587; *Spano* v. *New York*, 360 U.S. at 316). After making that independent determination, this Court concluded that by the "traditional" interpretations of the Fourteenth Amendment, Spano's confession was involuntary.

It is contended herein that this court has an even more compelling duty to review the record in the case at bar, and upon such review, petitioner is confident that this court will conclude that Pepe's confession and statements were involuntary, not only as a matter of law, but under "traditional" standards as set forth and explained in *Spano* v. *New York*, supra, and other cases.

While it is true that the dissenting opinion in *People* v. *Spano*, 4 N.Y. 2d at 266, discloses that three judges of the New York Court of Appeals were of the opinion that the omission to supply counsel to *Spano* was an egregious error, and at least four justices of this Court appear to have agreed with that sentiment, the actual holding of this Court in *Spano* v. *New York* was based upon "traditional" interpretations of the Fourteenth Amendment as to the issue of voluntariness.

In the case at bar, a "false" friend, Dr. Luigi Baviello,* who was also a co-conspirator, was utilized in much the same manner as Patrolman Bruno had been during the interrogation of Vincent Spano. Baviello lulled Pepe into a false sense of security by indicating that cooperation was

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* See footnote page 25, supra. Baviello admitted Pepe and he were *close friends* and lived and worked together for three years.

his only salvation and likewise caused Pepe to lose all hope, by disclosing that he, himself, had already deeply implicated Pepe in the criminal transgression.

It is obvious that at first Pepe decided to disclose nothing to the authorities but after interrogation by several skillful investigators, and cajoling and supplications by Baviello, coupled with threats and promises uttered by representatives of the New York State Department of Education (which Department controlled his license to practice medicine), petitioner, an Italian immigrant with a language problem, finally succombed after a clandestine discussion outside of his room with Picard, an investigator with the Department of Education, and his "*friend*" Dr. Baviello (1617).

In every sense of the word, psychological pressure, which was perhaps *more potent than physical torture* was devastatingly utilized (See *Leyra* v. *Denno,* 347 U.S. 556; *Spano* v. *New York, supra.*)

It must be borne in mind that Pepe was not being interrogated by local police authorities alone, but by officials of the New York State Department of Education including the director of professional conduct of the Department of Education (Bardo) and there can be no doubt that these officials could be instrumental in disciplining Pepe in many ways, including the suspension or revocation of his medical license both here and possibly in Italy.

A hearing reporter who was also a notary, employed by the Department of Education administered an oath to Pepe and the interrogation proceeded as if a formal hearing was being held. At more than one occasion Pepe was warned that he was committing "perjury" because he was under oath. This was certainly an additional factor which did not even appear in the *Spano* case.

Under the circumstances present therefore it is submitted that there can be no doubt but that Pepe's will was

overborne by skillful interrogation in his own room, after normal business hours, with the cunning utilization of threats of economic destruction, incarceration, disgrace, use of a "false friend", and administration of an *official oath* giving the aura of an *official* inquiry by the licensing agency controlling his medical practice. It is difficult to conceive of anything more coercive and more shocking to the conscience of this Court than the tactics which were practiced upon the Petitioner herein.

Finally, it is no answer to argue that Pepe had every opportunity to probe the question of voluntariness since the same was true to a significant extent, in *Spano* v. *New York.* This Court, in *Norris* v. *Alabama, supra,* and *Spano* v. *New York, supra,* has held that it must make an *independent review* of the record and cannot be concluded in a situation such as this by the determinations of the State Courts. Any other rule would necessarily mean that standards falling far below the minima required by the Fourteenth Amendment could be applied to extract confessions. This court never has, nor should it, countenance such deviations from the minimal standards it has prescribed in testing and determining voluntariness.

POINT III

Under the principle laid down in *Jackson* v. *Denno*, 378 U.S. 368, the State of New York was obliged to afford a two stage review of the issue of voluntariness of statements in connection with criminal cases. Thus in *People* v. *Huntley*, 15 N.Y. 2d 72, the New York Court of Appeals provided for review of such issues of voluntariness, first before a judge and then a completely *de novo* hearing before the trial jury. In respect to Pepe, however, who did receive a post trial "Huntley Hearing" the prosecution introduced new evidence, which new evidence was only reviewed by the trial judge and never by a petit jury. This deprived Pepe of his constitutional right to trial by jury and violated the "equal protection of the laws" and "due process" clauses of the Fourteenth Amendment.

The Fourteenth Amendment of the United States Constitution guarantees that no state may deprive any person of due process of the law or of the equal protection of the laws. At his trial, the recent decision of this Court in *Jackson* v. *Denno*, 378 U.S. 368 had not yet been pronounced. Under the then existing law at the trial, therefore, Pepe did not receive the constitutionally fair hearing which *Jackson* v. *Denno* requires. The New York Court of Appeals accordingly remanded the instant case to the trial court for a hearing pursuant to *People* v. *Huntley, supra,* which it had shortly before decided, in order to implement this Court's ruling in *Jackson* v. *Denno*.

The Appellate Division herein even recognized that the charge on confessions was less than careful. The *dissent* called the charge an *"error of constitutional dimension."* (See Appendix B, p. 42, *infra.*).

At the *Huntley* Hearing, there can be no dispute but that the prosecution introduced new or additional evidence

which had never been presented to the trial jury.* The procedure in New York clearly makes trial by jury mandatory even with respect to the question of voluntariness of confessions and admissions. It is therefore manifest that to the extent that the prosecution introduced new and additional evidence and produced new and material witnesses on the question of voluntariness, Pepe was denied equal protection of the laws because no trial jury was ever impanelled to resolve this important question. It must be borne in mind that the confession here was not merely "cumulative" evidence but was indispensable evidence which required acquittal if for any reason the confession should be deemed inadmissible (2974-5). Viewed in this light it is clear that Pepe was denied a very important constitutional guarantee by being deprived of a trial jury's determination of this crucial issue. Trial by jury is guaranteed to *all* persons prosecuted by indictment in New York (N. Y. Const. Art. 1 § 2).

No doubt the District Attorney will argue that trial by jury on this issue is not mandated by this Court since under the "orthodox" rule a jury trial is never accorded. Be that as it may, the simple fact remains that in New York State, the "Massachusetts" rule is extant and a jury trial is mandatory even on the question of voluntariness. To the extent that this important right was denied to Pepe, his rights under the equal protection and due process clauses of the Fourteenth Amendment were violated.

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* At the Huntley Hearing testimony of Stiles Ezell (H-48-160), Jerome Kidder (H-18-29) and William Jones (H-29-33) was received. These witnesses never testified at trial and no petit jury ever considered their credibility. Ezell had been secretary to the N. Y. Board of Medical Examiners, while Kidder and Jones were assistant district attorneys. They were vital witnesses.

CONCLUSION

For the reasons stated, it is respectfully requested that a writ of certiorari issue to review the judgment of the New York Court of Appeals.

Respectfully submitted,

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APPENDIX A

Constitutional Provisions, Statutes and Rules Involved

Constitution of the United States

Amendment V

. . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law;

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.Y. Code of Criminal Procedure

§ 395. Confession of defendant, when evidence, and its effect

A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed.

Appendix A

N.Y. Educational Law

§ 225. Unlawful acts in respect to examinations

A person who shall: . . .

4. Have in his possession question papers to be used in any such examination, when not contained in their sealed wrappers, or copies of such papers or questions, at any time prior to the date set for such examination, unless duly authorized by the regents or the commissioner of education; or

5. Sell or offer to sell question papers or any questions prepared for use in any examination held in accordance with this chapter or with the rules of the university; or

6. Use in any such examination any question papers or questions, or secure or prepare the answers to such questions prior to the time set for the examination; . . . is guilty of a misdemeanor and upon conviction thereof shall be punished for a first offense by a fine of not less than fifty dollars or imprisonment for not less than thirty days, or by both such fine and imprisonment, and for a second offense by a fine of not less than two hundred and fifty dollars or imprisonment for not less than six months or by both such fine and imprisonment.

§ 6514. Revocation of certificates; annulment of registrations

2. The license or registration of a practitioner of medicine, osteopathy or physiotherapy may be revoked, suspended or annulled or such practitioner reprimanded or disciplined in accordance with the provisions and procedure of this article *upon decision after due hearing in any of the following cases*:

(b) That a physician, osteopath or physiotherapist has been convicted in a court of competent jurisdiction, either within or without this state, of a crime;

APPENDIX B

22 A.D.2d 417

The PEOPLE of the State of New York, Respondent, v. Lucio J. PEPE, Appellants.

Supreme Court, Appellate Division, First Department, July 2, 1964

Before BREITEL, *J. P.*, and VALENTE, MCNALLY, STEVENS and STEUER, *JJ.*

Per Curiam.

Defendants were convicted after trial on five counts of unlawful acts in respect to examinations (Education Law, § 225(4), (5) and (6)) and one count of conspiracy to commit such crimes. The trial established the following facts: The Secretary of the Board of Medical Examiners obtained a copy of the examination questions for the June, 1961, examination to be given by the Board. Dr. Ezell gave a copy of these questions to defendant Pepe, a licensed physician. Pepe arranged with Dr. Baviello, another practicing physician, to sell the questions to candidates who would take the examination. For this Pepe was to receive $20,000 which he would share with Dr. Ezell. Dr. Baviello contacted defendant D'Alba, who was a physician licensed in Italy and who was a candidate to take the examination. As a result of this contact, D'Alba agreed to raise the money from such of his fellow candidates as would pay to have the questions. He raised a fund of something less than $10,000. He made up the balance himself. Dr. Baviello accepted this sum and delivered the questions to D'Alba who in turn distributed them to his subscribers. Before the examination was held the leakage of the examination questions was discovered and new questions were substituted. All of the persons mentioned learned of this, the

money was returned and the copies of the questions were destroyed.

Both defendants gave statements to the State Department of Education. These statements consisted of questions and answers given under oath in the Department's investigation, which, when transcribed, were signed by the respective defendants. The statements, properly designated as confessions, were received in evidence at the trial. It was claimed on the trial that the confessions were not given voluntarily. It is further argued on this appeal thta the jury was not adequately instructed in regard to whether they could consider the confessions, specifically on the degree of proof required. We are in accord that this presents the only substantial question on this appeal.

We conclude that there was no error in this respect. It may be conceded that a more careful treatment would have avoided the appearance of error, and that requests to charge phrased in the language of People v. Vargas, 7 N.Y.2d 555, 200 N.Y.S.2d 29, 166 N.E.2d 831, could well have been given. It is well to distinguish between error and a faultless performance. It is the instructions given and not the technique of the judge that is the criterion.

The court did charge that unless the confessions were voluntary they could not be considered. He defined what is meant by voluntary. He also charged that every element of the prosecution's case must be established beyond a reasonable doubt. The alleged error is that these were not correlated, in that it was not specifically charged that the confessions must be shown to be voluntary beyond a reasonable doubt. However, after the conclusion of the main charge, and one of the final instructions given, was a compliance with a request by defendant Pepe. The court charged:

> "[I]f the jury have any reasonable doubts as to whether the statements under oath, dated July 19th,

1961, and July 25th, 1961, were obtained by the use of fear induced by threat, then and in that event they must find the defendant Pepe not guilty."

As far as this defendant is concerned, he had the benefit of his own statement of what the law is on the subject and he can hardly be heard to complain. As far as D'Alba is concerned, it is inconceivable that the jury would apply any other test to his confession than they were instructed to give to his co-defendant's. And it may well be that the court in refusing D'Alba's request of a similar nature so deemed. (D'Alba's request having been submitted in writing, the jury could not have known that it was refused or draw any distinction between the defendants from the refusal.)

Furthermore, there is very grave doubt as to whether any issue existed as to D'Alba's confession being voluntary. On the advise of counsel he waived immunity and testified before the grand jury. His testimony, received in evidence, parallels, almost exactly, the questions and answers he gave to the Department of Education. While he testified on the *voir dire* that he had perjured himself before the grand jury and stated in general terms that none of the testimony given there was true, when he came to testify in his own defense, as to most of the matters his evidence exactly followed the two prior statements. So that according to his own version, his testimony before the grand jury and his statements in his confession fairly represent his acts. While the fact that a confession is true does not ipso facto make it voluntary, when that confession is exactly like a statement that is concededly voluntary, it must go a long way toward establishing that the confession was freely given.

The judgments of conviction should be affirmed.

Judgments of conviction affirmed.

All concur except VALENTE, *J.*, who dissents in dissenting opinion.

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VALENTE, *Justice* (dissenting).

I dissent and would reverse the judgments of conviction and order a new trial. I find that the Trial Court's instructions as to how the jury were to discharge their responsibility in determining whether confessions obtained from defendants were uncoerced and voluntary, failed adequately and fairly to set forth the essential matters to be considered in arriving at their conclusion. The inadequacy of the instructions given, coupled with the refusal of the Trial Court, when requested, to charge additionally on the subject, constituted prejudicial error, as a matter of law, requiring a reversal and the granting of a new trial.

From the time the selection of the jury began and the verdict was rendered, the trial consumed a period of about eight weeks. As part of the prosecution's proof, the People relied upon incriminating statements, i.e., confessions, of the appellants. However, before the confessions were admitted into evidence, defendants challenged their voluntary character, and an extensive *voir dire* inquiry (covering about 700 pages of the record) was conducted as to the conditions under which the confessions were obtained. The Trial Judge properly concluded to submit to the jury for their determination the question of the voluntariness of the inculpatory statements.

Despite the extensive examination on the issue of the voluntariness of the confessions, the Trial Judge gave but a perfunctory charge on the subject of their admissibility in the following words, that "any statements allegedly made by defendants to anyone in which they admitted their guilt to the crime, may be given in evidence against them, unless such statements were made under the influence of fear produced by threats or were made as a result of physical beatings." At the conclusion of the charge, the Trial Judge, at the request of defendant Pepe, did additionally instruct the jury to some further degree on the matter of

Pepe's confessions. But even these supplementary instructions as to Pepe were too little and too late. Moreover, not having been given in the mainstream of the charge, where they properly belonged, the additional instructions as to Pepe were drained of their effectiveness in directing the jury's attention to this critical phase of Pepe's defense.

But a comprehensive request by counsel for D'Alba for a charge on the essential elements to be considered in arriving at a conclusion as to the voluntariness of D'Alba's confessions and for a specific charge that the standard of proof to be applied was that of "beyond a reasonable doubt," was refused by the Court. The charge requested by D'Alba's counsel was proper and should have been given to the jury. There can be no dispute that the correct standard of proof is that of "beyond a reasonable doubt". (See People v. Vargas, 7 N.Y.2d 555, 200 N.Y.S.2d 29, 166 N.E.2d 831; People v. Leyra, 302 N.Y. 353, 98 N.E.2d 553; People v. Valletutti, 297 N.Y. 226, 78 N.E.2d 485.)

Despite the refusal to charge as requested by defendant, D'Alba, the People nevertheless contend that there was sufficient in the charge respecting defendant Pepe to convey adequately to the jury the standards to be applied in testing the admissibility of D'Alba's confessions, without the necessity for the requested additional instructions.

But as already indicated, the Court's entire charge on the issue of the admissibility of the confessions was woefully inadequate. (See People v. Everett, 10 N.Y.2d 500, 225 N.Y.S.2d 193, 180 N.E.2d 556 and People v. Vargas, 7 N.Y.2d 555, 200 N.Y.S.2d 29, 166 N.E.2d 831, supra, for illustrations of the proper scope of instructions on the admissibility of inculpatory statements.) Hence, such inadequate instructions can hardly serve as a proper crutch upon which to rest a contention that they should be extended by implication to excuse the refusal to charge the specific request of defendant D'Alba as to the standards to be applied to the resolution of the issue of the voluntariness of his alleged confessions.

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In an attempt to minimize the prejudicial effect of the error in instructing the jury, the majority questions whether there was any issue as to the voluntariness of D'Alba's confessions. Primarily, it would seem that the extensive examination on the *voir dire* should dispel any such contention. Secondly, it was for the jury, under proper instructions, to resolve that question. Surely it was solely for the jury to determine which was true—D'Alba's confessions, his testimony before the grand jury or his testimony at the trial. He contended, at the trial, that his confessions and his testimony before the grand jury were untruthful, and were induced by fear of the consequences that would ensue if he did not make the inculpatory statements and similarly testify before the grand jury. It was for the jury, and not this Court, to draw conclusions as to the voluntariness of the confessions from the claimed similarities between D'Alba's testimony at the trial and the extra-judicial statements. The defendant Pepe did not testify at the trial or on the *voir dire* but he, too, contended that his confessions were induced by fear. Certainly, we may not, on this record, treat the very crux of the defense as not even rising to the dignity of a triable issue.

There was a crucial and substantial issue of fact presented on the *voir dire* as to whether the confessions were voluntary. In effect, the resolution of that issue amounted to a trial within a trial. If the jury found that the confessions were not voluntarily made, then a substantial portion, if not the entire case, of the People would be destroyed.

Therefore, both defendants were entitled to have the jury instructed at length and in detail as to the nature of a confession, the burden of proof, the duty to determine the credibility of the witnesses on the *voir dire*, their province to decide whether the confessions were freely and voluntarily made, and what "free and voluntary" meant. De-

fendants were also entitled to instructions that if the jury concluded that a confession was made as a result of fear—or if the jury entertained a reasonable doubt on that subject, irrespective of whether the confession was true—the jury were obliged to reject such a confession and not to consider it in their deliberations. Finally, there would also have to be explicit instructions that if the jury found a confession was voluntarily made, then they would have to determine whether it was the truth and whether there was other evidence to corroborate the confession.

The majority opinion of this Court reluctantly concedes that "a more careful treatment" of the instructions as to the confessions "would have avoided the appearance of error" and that a "charge phrased in the language of People v. Vargas, 7 N.Y.2d 555, 200 N.Y.S.2d 29, 166 N.E. 2d 831, could well have been given". Moreover, the majority would relegate the inadequacy of the charge and the refusal to give the requested additional instructions to the status of a deviation from faultless judicial technique rather than substantial error. I cannot accede to such depreciation of an error of constitutional dimensions to an inconsequential judicial peccadillo.

Finally, even though apart from the confessions, there may be other proof in the record of the guilt of defendant D'Alba, the error as to the faulty instructions cannot be disregarded. We cannot speculate as to what credit and weight the jury gave to the confessions. (See People v. Donovan, 13 N.Y.2d 148, 153, 243 N.Y.S.2d 841, 844, 193 N.E.2d 628, 630.) As to defendant Pepe, the exclusion of the confessions would have entitled him to an acquittal. It was thus essential that the jury receive proper and adequate instructions to enable them to perform their function in arriving at a conclusion as to voluntariness.

The failure of the Trial Court to charge adequately on the matter of the confessions in this case was prejudicial error, as a matter of law. The judgments of conviction as to each defendant should therefore be reversed and a new trial ordered.